

**THIS DISPOSITION IS
NOT CITABLE AS
PRECEDENT OF THE TTAB**

Mailed:
August 9, 2006
Bucher

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Nigrelli Systems, Inc.

Serial No. 78309815

Joseph D. Kuborn of Andrus Sceales Starke & Sawall, LLP
for Nigrelli Systems, Inc.

Tricia McDermott Thompkins, Trademark Examining Attorney,
Law Office 101 (Ronald R. Sussman, Managing Attorney).

Before Quinn, Bucher and Rogers, Administrative Trademark
Judges.

Opinion by Bucher, Administrative Trademark Judge:

Nigrelli Systems, Inc., seeks registration on the
Principal Register of the mark **AQUAMASTER** for goods and
services described in the application, as amended, as
follows:

"pond aeration equipment, namely a
submerged electric pump for circulating
water from the bottom to the top of lakes
or ponds; water fountains" in International
Class 11; and

"wholesale and retail store services featuring pond aeration equipment and water fountains" in International Class 35.¹

This case is now before the Board on appeal from the final refusal of the Trademark Examining Attorney to register applicant's mark based upon Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d). The Trademark Examining Attorney has found that applicant's mark, when used in connection with the identified goods and recited services, so resembles the mark shown below

The logo for Aquamaster, featuring the word "Aquamaster" in a bold, italicized, sans-serif font. Above the letter 'a' is a stylized graphic of a wave or a mountain peak.

that is registered for

"water purification systems for residential, commercial and industrial use, namely reverse osmosis water systems comprising filter housings, membrane housings, sediment pre-filters, carbon post filters, membranes, reservoir tanks, long reach faucets, check valves, ball valves, auto shut-off valves, booster pumps, pressure switches, flow restrictors and transformers; ultraviolet water systems comprising ultraviolet lamps, quartz sleeves, filter housings, membrane housings, sediment pre-filters, carbon post filters, membranes, reservoir tanks, long reach faucets, check valves, ball valves,

¹ Application Serial No. 78309815 was filed on October 6, 2003 based upon applicant's allegation of first use anywhere and first use in commerce in both classes at least as early as December 29, 1960.

auto shut-off valves, booster pumps, pressure switches, flow restrictors and transformers; and water filtration systems comprising booster pumps, water softeners, filter housings, membrane housings, sediment pre-filters, carbon post filters, membranes, reservoir tanks, long reach faucets, check valves, ball valves, auto shut-off valves, booster pumps, pressure switches, flow restrictors and transformers" in International Class 11,²

as to be likely to cause confusion, to cause mistake or to deceive.

Applicant and the Trademark Examining Attorney have fully briefed this appeal, but applicant did not request an oral hearing. We reverse the refusal to register.

The Trademark Examining Attorney contends that applicant's goods and services are related to registrant's goods, and that they might well be available within the same retail establishments. By contrast, applicant argues that confusion is not likely due to decided differences between its goods and services and the goods identified in the cited registration, and furthermore, that the respective items are all expensive, and hence would be purchased by sophisticated purchasers.

² Registration No. 1969574 issued on April 23, 1996 claiming use anywhere and use in commerce at least as early as September 1, 1990. Section 8 affidavit (six-year) accepted and Section 15 affidavit acknowledged.

Analysis: Likelihood of Confusion

Our determination under Section 2(d) is based upon an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. In re E.I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the relationship of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

The marks

We turn first to the du Pont factor focusing on the similarity of the marks in their entirety. We must consider whether the marks are similar in sound, appearance, meaning, and commercial impression. Palm Bay Imports Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772, 396 F.3d 1369, 73 USPQ2d 1689 (Fed. Cir. 2005).

In spite of a small design feature in registrant's mark, applicant does not contest the position of the Trademark Examining Attorney that these marks are substantially identical when applying any or all of these

criteria. Accordingly, this du Pont factor favors the position of the Trademark Examining Attorney.

The relationship of the goods and services

The Trademark Examining Attorney argues that the goods and services are related in such a manner that the prospective purchasers would mistakenly believe that the goods and services emanate from a common source. Applicant strongly disagrees, asserting that there is a decided dissimilarity between the respective goods and/or services, and the purposes they each serve.

In short, applicant has contended throughout the prosecution of this application that these respective goods have a different purpose based on the clear meaning of the words, e.g., applicant's goods are "used for 'circulating water within a pond to prevent the growth of water plants, such as algae, to keep the pond visually appealing'" (applicant's brief, p. 4), while registrant's goods are used to "remediate and process contaminated water for later useful purposes, such as consumption." Applicant's brief, p. 5. We agree that based simply on the terminology contained within the respective identifications of goods, a relationship between these

goods has not been demonstrated herein. We hasten to add that in construing the plain meanings of the written descriptions, and in considering the arguments of the applicant and Trademark Examining Attorney on this issue, we have not permitted applicant to artificially and impermissibly restrict either its own or registrant's identifications, which it may not do.

In support of her position, the Trademark Examining Attorney begins by reviewing dictionary definitions, and argues that the purpose of "aeration" equipment in lakes and ponds is to *purify*³ these bodies of water. This function is, she contends, similar to the purposes of registrant's *water purification* systems. Furthermore, she adds that "not only is the purpose and function of the applicant's and registrant's goods and/or services identical, but also so [sic] is the environment in which a consumer may encounter the goods." Trademark Examining Attorney's appeal brief, unnumbered p. 7.

By definition, ponds, lakes and water fountains are often designed into the broadly-stated "residential,

³ The Trademark Examining Attorney cited to a dictionary entry of "**aerate**" for support of the fact that "the purpose of aeration is '[t]o expose to the circulation of air for *purification*.'" THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (Third Edition 1992). See Initial Office action of March 29, 2004.

commercial and industrial settings" described in the cited registration. Hence, we agree with the Trademark Examining Attorney that the type of goods marketed by registrant and the type of goods marketed by applicant may, broadly speaking, be utilized in the same venue (e.g., developments that feature both recreational ponds in need of aeration and well-supplied water sources relying upon filtration and purification systems).

Furthermore, although the record contains no evidence on this point, it would not be surprising to learn that aeration equipment and purification equipment might be marketed through similar channels of trade. There might well be some overlap in potential customers, such as engineers and other professionals in the construction fields.

Nonetheless, we do not find convincing the Trademark Examining Attorney's deductions from a dictionary entry of the verb "aerate." Applicant acknowledges that its aeration equipment may purify to the extent that the process of aeration prevents the aerated lake or pond from becoming stagnant and foul. However, the word "purify" is

too broad a term⁴ to demonstrate a relationship between these goods. The resulting interpretation of both applicant's and registrant's goods proposed by the Trademark Examining Attorney is too broad. In addition, the Trademark Examining Attorney incorrectly concludes that the separate components of registrant's systems must each be considered an item separately marketed under the registered mark. Registrant's identification does not cover a multitude of separate items, as the Trademark Examining Attorney argues. Instead, it covers "reverse osmosis water systems," "ultraviolet water systems," and "water filtration systems," each of which is introduced by the broad reference to "water purification systems for residential, commercial and industrial use," and each of which is comprised of various components.

Having conceded above that these different types of equipment may ultimately be used in the same setting does not force the determination they are related for purposes of our likelihood of confusion analysis. Cf. Electronic

⁴ "Purify 1. To make pure; free from anything that debases, pollutes, adulterates, or contaminates: *to purify metals*. 2. to free from foreign, extraneous, or objectionable elements: *to purify a language*. 3. to free from guilt or evil. 4. to clear or purge (usually fol. by *of* or *from*). 5. to make clean for ceremonial or ritual use. -v.i. 6. to become pure." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, (Second Edition 1983).

Design & Sales v. Electronic Data Systems, 954 F.2d 713, 21 USPQ2d 1388, 1392 (Fed. Cir. 1992) [The Court found no likelihood of confusion resulting from the contemporaneous use of applicant's mark E.D.S. and opposer's mark EDS despite the fact that "the two parties conduct business not only in the same fields but also with some of the same companies."] We must still explore in depth the nature of these goods.

There is very little evidence in the record about these respective goods, so our determination rests heavily on the plain meaning of the descriptions in the cited registration and the involved application.

Upon reviewing applicant's identification of goods, it is clear that applicant sells aerating pumps and fountains for use in lakes and ponds. There is no support anywhere in the record for the Trademark Examining Attorney's contention that applicant's pond aeration equipment might be used directly with registrant's identified goods. By contrast, we read the registrant's identification of goods as covering sophisticated systems designed to remediate and process water. This description contains three well-defined systems - (i) reverse osmosis water systems, (ii) ultraviolet water systems and (iii)

water filtration systems - each with its own detailed listing of sub-systems and component parts. While it is true that there are no limitations in registrant's identification of goods (e.g., the goods are not explicitly limited to remediation of water supplies) and they are "broadly defined as being used in any residential, commercial or industrial environment," on this record, it is too much of a stretch for us to find that registrant's systems would be used outdoors in ponds, lakes and water fountains. Accordingly, looking solely to the plain meaning of these respective descriptions, we find that applicant's goods and services are decidedly different in nature and purpose from registrant's goods.

Notwithstanding the lack of direct support in the record, we have acknowledged that these respective goods might well be encountered by overlapping classes of consumers. Yet, we cannot agree with the Trademark Examining Attorney's specific contention "that a consumer seeking such [a booster] pump may encounter both the applicant's and registrant's goods in the applicant's retail stores."⁵ There are a number of fallacies in this argument.

⁵ The Trademark Examining Attorney also argues that:

First, as to the "booster pump" argument, the Trademark Examining Attorney did place into the record Internet evidence showing that quite disparate systems that involve the pumping of water (e.g., small, residential solar pumps and large, industrial dredging operations) rely upon a category of pumps known as booster pumps. Accepting this as true does not help to tie together the goods of registrant and applicant. In fact, it would involve sheer speculation on our part to conclude that registrant's booster pump components would be at all similar to, or used in conjunction with, applicant's submerged aeration pumps.

Secondly, registrant's identification cannot be read to suggest that registrant sells individual components such as its booster pumps apart from its larger purification systems.

Thirdly, we are not convinced that the complex goods of either registrant or applicant are intended for "do-it-

"[A]pplicant ignores the relatedness of the services to the registrant's goods." ... [E]vidence attached in [sic] the Final Office Action demonstrates that pumps and specifically, registrant's booster pumps are used in all water applications, including ponds. Therefore, consumers seeking pumps and related goods for water applications are likely to encounter both the applicant and registrant's goods in the applicant's retail stores."

Trademark Examining Attorney's appeal brief, unnumbered p. 8.

yourself" persons.⁶ Registrant's goods are obviously complex systems with many components; and even though applicant's goods are sold at retail, that does not mean that applicant runs a retail store open to general consumers. It is too speculative for us to conclude that applicant's goods would be sold in retail stores to such consumers, rather than at retail to professionals seeking to manage and aerate ponds or lakes.

Fourthly, even assuming that registrant's booster pumps and applicant's goods may be used in the same venues, it does not follow that the types of pumps marketed by registrant would be sold at retail by applicant, whose retail services are limited to pond aeration equipment and water fountains. Clearly, applicant's description of its retail services does not mention the retailing of booster pumps.

⁶ The Trademark Examining Attorney contends that: "similarly, the applicant's wholesale and retail store services would include aeration pumps and water fountains. Both are goods that both professionals and lay consumers would seek out for complex landscaping projects or small do-it-yourself projects. It is significant to note that water fountains are a typical consumer product found in many residential settings. Therefore, consumers would patronize the applicant's store and be exposed to all the goods provided therein. Thus, having exposure to residential filtration pumps and pond aeration pumps in the same setting would give rise to a likelihood of confusion."

Trademark Examining Attorney's appeal brief, unnumbered pp. 9 - 10.

Finally, we do not find it reasonable to assume, as the Trademark Examining Attorney has, that applicant would ever choose to sell, in its own stores, registrant's AQUAMASTER pumps, and thereby create the possibility of confusion with its own products.

In conclusion, on this du Pont factor, we find that the only reasonable reading of these identifications dictates a finding that applicant's goods and services are not closely related to registrant's goods. Rather, we agree with applicant's conclusion that "[p]ond aeration equipment and water fountains are significantly different from [reverse osmosis] water purification systems, water filtration systems and ultraviolet water systems."

Applicant's reply brief, p. 4. Moreover, we agree with applicant that based upon a complete and logical reading of registrant's identification of goods, "the goods of the registrant are intended to purify water, most likely for consumption, and would have no use or application in ponds or lakes, and certainly not in water fountains."

Applicant's reply brief, p. 3. Hence, this du Pont factor favors strongly the position taken by applicant.

Sophisticated purchasers

As to the du Pont factor focusing on the conditions under which and buyers to whom sales are made, this is not a determinative factor in the instant case. Although applicant argues in its brief that "[p]ond aerators and water fountains are 'expensive items' which will only be purchased by select individuals," there is no proof of this in the record. However, even in the absence of any evidence that applicant's goods are expensive, or that registrant's individual systems would be expensive, those systems appear to involve many integrated components, and finally, the parties' complex goods do not appear to be intended for do-it-yourself persons. Accordingly, the only common consumer would be a relatively sophisticated consumer, and this factor helps to eliminate any remaining doubt we might otherwise harbor as to whether there is a likelihood of confusion herein.

Contemporaneous use without actual confusion

As to the du Pont factor dealing with the length of time during and conditions under which there has been contemporaneous use without evidence of actual confusion, applicant points to fifteen years of coexistence (since

registrant adopted and began using its mark) without any actual confusion. However, we have no evidence that these respective marks have ever been used contemporaneously in the same geographical area. As to whether there has been sufficient opportunity for confusion to occur, the record contains no indication of the level of sales or advertising by applicant. The absence of any instances of actual confusion is a meaningful factor only where the record indicates that, for a significant period of time, an applicant's sales and advertising activities have been so appreciable and continuous that, if confusion were likely to happen, any actual incidents thereof would be expected to have occurred and would have come to the attention of one or both of these trademark owners. Similarly, we have no information concerning the nature and extent of registrant's use, and thus we cannot tell whether there has been sufficient opportunity for confusion to occur, as we have not heard from the registrant on this point. All of these factors materially reduce the probative value of applicant's argument regarding asserted lack of actual confusion. Therefore, applicant's claim that no instances of actual confusion have been brought to applicant's attention is not

indicative of an absence of a likelihood of confusion.
See Gillette Canada Inc. v. Ranir Corp., 23 USPQ2d 1768,
1774 (TTAB 1992). In any event, we are mindful of the
fact that the test under Section 2(d) of the Act is
likelihood of confusion, not actual confusion.
Accordingly, this is a neutral factor in our determination
herein.

Conclusion

In conclusion, we find that despite the fact that the
marks are substantially identical, on this record, we
cannot conclude that these goods are sufficiently related
to find a likelihood of confusion herein, especially given
the fact that the only common purchasers would be
relatively sophisticated.

Decision: The refusal to register this mark under
Section 2(d) of the Lanham Act is hereby reversed.